

**WEINER
BRODSKY
SIDMAN
KIDER PC**



July 2, 2010

BY HAND

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

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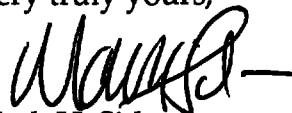
RE: Finance Docket No. 35348, CSX Transportation, Inc. and Delaware and Hudson
Railway Company, Inc. – Joint Use Agreement

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding are an original and ten copies of the *Public Version* of the Comments in Opposition to Proposed Transaction of New York & Atlantic Railway Company. Attached hereto is a Certificate of Service.

Please acknowledge receipt of this filing by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,


Mark H. Sidman

Enclosures

NYA-5

BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

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FINANCE DOCKET NO. 35348

CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – JOINT USE AGREEMENT

NEW YORK & ATLANTIC RAILWAY COMPANY'S
COMMENTS IN OPPOSITION TO PROPOSED TRANSACTION
AND REQUEST FOR CONDITIONS

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Dated: July 2, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35348

**CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – JOINT USE AGREEMENT**

**NEW YORK & ATLANTIC RAILWAY COMPANY'S
COMMENTS IN OPPOSITION TO PROPOSED TRANSACTION
AND REQUEST FOR CONDITIONS**

New York & Atlantic Railway Company ("NYA" or the "Company") hereby submits its Comments in Opposition and Request for Conditions with respect to the Application of CSX Transportation, Inc. ("CSXT") and Delaware and Hudson Railway Company, Inc. ("D&H") (the "Application") to enter into a "joint use agreement" whereby, among other things, (i) D&H would cease operating trains, via trackage rights, over the CSXT line from Albany, NY to Fresh Pond, NY (the "Albany-Fresh Pond Segment")¹, and (ii) CSXT would provide haulage service² to D&H over the Albany-Fresh Pond Segment . As

¹ Portions of the Albany-Fresh Pond Segment over which D&H operates are owned, respectively, by National Railroad Passenger Corporation ("Amtrak"), Metro North Commuter Railroad ("MNCR") and the City and/or State of New York ("NYDOT").

² D&H and CSXT characterize their proposed arrangement over the Albany-Fresh Pond Segment as "joint use." In fact, though, only one of those two carriers -- CSXT-- will use that line under their proposal. The Surface Transportation Board correctly noted in its decision, served May 27, 2010 (the "Initial Decision"), that the commercial transaction described in the Application is, in essence, a haulage arrangement. Initial Decision at 4, fn. 7. The transaction described in the Application has all of the standard terms of a haulage agreement: Cars remain in the account of the handing-off carrier; the hauling carrier does not appear in the rate or route; the handing-off carrier retains liability on a no-fault basis; etc.

discussed below, NYA opposes the approval of the transaction proposed by CSXT and D&H (together, the “Applicants”) in this proceeding unless such approval is conditioned upon the requirement that D&H keep in place the current rates and divisions (subject to annual cost escalation) on stone traffic moving from certain upstate New York origins to Long Island (the “Stone Traffic”), for a period of five years.

I. Background

NYA is the exclusive provider of rail freight service in Nassau and Suffolk Counties, NY. It also provides service in the Boroughs of Queens and Brooklyn, NY. The Company operates on lines of The Long Island Rail Road pursuant to an agreement with that carrier. *New York & Atlantic Railway Company – Operation Exemption – The Long Island Rail Road Company*, STB Finance Doc. No. 33300, served November 17, 1997. It interchanges with CSXT, D&H and Providence and Worcester Railroad Company at Fresh Pond Junction, and with Norfolk Southern Railway Company and CSXT at Greenville, NJ (via the car float operated by New York New Jersey Rail, LLC). However, virtually all of NYA’s traffic is interchanged with CSXT or D&H at Fresh Pond. Verified Statement of Paul Victor (“V.S. Victor”) at 2 (a copy of V.S. Victor is appended hereto as Exhibit A).

The geographic market NYA serves does not have a heavy industrial base or other types of businesses that rely heavily on rail transportation (e.g., mining, agriculture, chemicals, etc.). Instead, the principal traffic hauled by the Company

consists of inbound building materials (stone, lumber, brick, etc.) and food products, and outbound construction and demolition material, waste and scrap metal. *Id.*

D&H, which is an affiliate of Canadian Pacific Railway Company ('CPR'), owns and operates rail lines in New York, New Jersey and Pennsylvania. Application at 3. D&H has overhead trackage rights over the Albany-Fresh Pond Segment, which it uses to interchange traffic with NYA at Fresh Pond.³

These rights were granted to D&H as the result of the decision of the Surface Transportation Board (the 'Board') in *CSX Corp. et al. – Control – Conrail Inc., et al.*, 3 S.T.B. 196, 1998 WL 456510, at 52-53 (1998) ('*Conrail*'). In *Conrail*, to ensure that a "modicum of competition" would exist in the New York metropolitan area, the Board imposed a condition requiring CSXT to enter into an agreement with D&H for trackage rights or haulage rights over the line from Fresh Pond to Selkirk, NY (near Albany). *Id.* at 53. This condition addressed concerns voiced by New York Department of Transportation, New York Economic Development Corporation and others that a settlement agreement entered into by CSXT and D&H, which provided D&H with haulage rights, would be inadequate to make D&H a viable competitor in the New York

³ D&H's "East-of-the-Hudson" rights also provide that carrier with access, via CSXT, to certain customers in the New York metropolitan area.

metropolitan area. *Id.* at 52-53. D&H and CSXT entered into the trackage rights for the Albany-Fresh Pond Segment in July 1999.

II. The Proposed Transaction

The Applicants characterize the Proposed Transaction as a “joint use” arrangement that requires authorization from the Board under 49 U.S.C. § 11323(a) (6). They state that:

Pursuant to the Joint Use Agreement, D&H has granted CSXT the right to use, jointly with D&H, the Saratoga-Rouses Point Segment and the Albany-Saratoga Springs Segment. CSXT has reciprocally granted to D&H the right to use, jointly with CSXT, the Albany-Fresh Pond Segment.

Application at 5.

Under the Joint Use Agreement between CSXT and D&H, a copy of which is appended as Exhibit 2 to the Application (the “Joint Use Agreement”), CSXT will handle all D&H traffic moving to or from Fresh Pond for interchange with NYA, in D&H’s account. Joint Use Agreement § 3.01(c). D&H will pay a fee for CSXT’s handling of D&H’s cars. *Id.* § 9.03. D&H will pay all car hire that accrues on the D&H Joint Use Traffic, *id.* § 5.02, and share the liability in connection with train incidents occurring when CSXT is handling D&H Joint Use Traffic. *Id.* § 13. At the same time, D&H will cease using its trackage rights over the Albany Fresh Pond Segment. *Id.* § 2.05(b) (“during the Term of this Agreement, D&H shall not exercise the rights granted to it pursuant to the D&H-CSXT New York Trackage Rights Agreement . . . but shall tender all D&H Joint Use Traffic moving between Albany and Fresh Pond, NY to CSXT . . .”).

The Applicants urge the Board to approve the Joint Use Agreement on the grounds that it will reduce D&H's costs and enable D&H to provide daily service, which 'D&H believes it must be able to offer . . . in order to be an effective competitor in the Albany-New York City corridor.' Application at 4. The Applicants state that the proposed transaction will make D&H more competitive in the New York metropolitan area market: "Moving its traffic in CSXT regularly scheduled train service will greatly improve D&H's competitive capabilities in the corridor, by enabling D&H to increase its service offerings from twice weekly to five to seven days per week, and eliminating the inefficiencies associated with D&H's current light density train operations." *Id.* at 7-8.

A basic premise of the Application appears to be that D&H should be permitted to cease using its trackage rights over the Albany-Fresh Pond Segment for up to 40 years⁴, without obtaining discontinuance authority from the Board under 49 U.S.C. § 10903, because the haulage arrangement under the Joint Use Agreement will make D&H a stronger competitor, handling increased traffic volumes, in the New York metropolitan area. As discussed below, NYA is concerned, for two principal reasons, that the proposed Joint Use Agreement will in fact jeopardize the one remaining important block of traffic—Stone Traffic—that D&H handles to the New York market and interchanges with NYA. *First*, the Joint Use Agreement will add a third carrier to the

⁴ Section 10.02(a) of the Joint Use Agreement provides that the agreement will remain in effect for 20 years. Section 10.02(b) gives each of D&H and CSXT the right to extend the agreement for an additional 20-year term.

Stone Traffic, which is rate constrained. D&H's share of the revenue from the traffic, after payments to CSXT and third parties, may well be insufficient to keep D&H interested in the business. *Second*, the cessation of D&H's train operations to and from Fresh Pond will leave it with no investment in traffic interchanged with NYA. The Application, if approved by the Board without conditions, would allow D&H to walk away from the New York market without cost, without a regulatory proceeding and perhaps without regret.

III. The D&H/NYA Interchange Traffic

Despite the Board's optimism in its *Conrail* decision that D&H would provide a 'modicum of competition' in the New York metropolitan area, D&H has not been a robust competitor in that market. The interchange traffic handled by NYA and D&H since 2006 is as follows:

Traffic History Between D & H (CPR) and New York & Atlantic for Period 2006 and 2010					
<i>Year</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>
Non Stone Traffic	[]	[]	[]	[]	[]
Stone Traffic	[]	[]	[]	[]	[]
<i>Total Traffic</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>

V.S. Victor at 3.

The foregoing data reflect that, since [], the only significant traffic that has been interchanged between D&H and NYA is the Stone Traffic. The Stone Traffic has grown from [] carloads in 2006 to [] carloads in 2009. *Id.* This traffic flow is very

important to NYA: In 2008, the Stone Traffic accounted for [] percent of NYA's total carload volume and [] percent of NYA's freight revenue. *Id.* The Stone Traffic was even more important to NYA in 2009, when it produced [] percent of NYA's carloadings and [] percent of NYA's revenue. *Id.* This traffic has been one of the bright spots for NYA during the recent financial downturn. NYA can ill afford to lose this piece of business.

The Stone Traffic is also important to Long Island. Today, stone moving to Long Island, other than the Stone Traffic, is handled by truck or barge, from a limited number of quarries. The rail transportation of stone by NYA and D&H increases competition for that material by giving additional quarries (*i.e.*, quarries that do not have effective barge or truck options) access to the Long Island market. This increase in the supply of stone provides purchasers with additional sources of that material and exerts downward pressure on the price of stone, to the benefit of governmental entities and private parties that use stone for road construction and other construction purposes. *See generally, U.S. Rail Corporation – Construction and Operation Exemption – Brookhaven Rail Terminal*, STB Finance Docket No. 35141.

At the same time the Stone Traffic has grown, the volume of commodities other than stone interchanged by NYA and D&H (Other Traffic) has dropped steadily and dramatically, from [] carloads in 2006 to just [] carloads in 2009. *V.S. Victor* at 3. The annualized volume of Other Traffic in 2010 is a paltry [] carloads. *Id.* Similarly,

the volume of the traffic D&H handles with CSXT via Oak Point, NY has dropped from [] carloads in 2007 to [] carloads in 2009. Responses and Objections of Delaware and Hudson Railway Company, Inc. to the New York & Atlantic Railway Company's (NYA's) First Set of Interrogatories and Requests for Production ('D&H Responses') at 5. (A copy of the D&H Responses, without attachments, are appended hereto as Exhibit B). As these data illustrate, D&H has effectively withdrawn from the New York metropolitan area market for all traffic other than Stone Traffic.

A. The Stone Traffic Will Be A Marginal Three-Carrier Move

The current rate on the Stone Traffic is \$[] per carload⁵. V.S. Victor at 4. Of this, NYA receives a division of \$[] and CP receives a division of \$[]. *Id.* Under the Joint Use Agreement, D&H would pay CSXT []

⁵ Stone traffic currently moves from two D&H origins (Saratoga Springs and Comstock, NY) to a NYA-served customer at Holtsville, NY.

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Thus, if the Board were to approve the Application, the current rate for the Stone Traffic of \$[] per carload would be divided among the three participating railroads—NYA, D&H and CSXT—as follows:

[]		[]	
_____		_____	
CSXT	\$[]		\$[]
NYA	\$[]		\$[]
D&H	\$[]		\$[]

[] ,

.] For its share of revenue, D&H would have to handle Stone Traffic originating at Comstock approximately 81.52 miles (approximately 39 miles from Comstock to Saratoga Springs plus approximately 42.52 miles from Saratoga Springs to Albany), and D&H would have to handle Stone Traffic originating at Saratoga Springs approximately 42.52 miles) to Albany. V.S. Victor at 4-5. In 2009, [] carloads of the Stone Traffic—[] percent—were originated at Comstock and [] carload of the Stone Traffic were originated at Saratoga Springs. *Id.*

⁶ [] .]

⁷ In 2009, NYA and D&H handled [] carloads of interline traffic.

Even if D&H's top line revenue share of the Stone Traffic under the Joint Use Agreement [] were adequate to keep the interest of a Class I originating carrier, which is unlikely, the top line revenue share overstates the amount of money D&H will earn on this traffic. Under section 9.03(d) of the Joint Use Agreement, D&H must pay to Metro North, Amtrak or NYDOT "any compensation for the movement of D&H Joint Use Traffic pursuant to agreements under which D&H currently has access, trackage or similar rights to use portions of the Albany-Fresh Pond Segment between Schenectady, NY and New York City, NY over rail lines owned by these entities." []

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[

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In addition, under section 13 of the Joint Use Agreement, D&H bears liability on a no-fault basis for D&H Joint Use Traffic handled by CSXT. D&H's share of liability generally is the percentage of D&H Joint Use Traffic in a CSXT train operating over the Albany-Fresh Pond Segment. This liability allocation, which would not exist in the normal case of interchanged traffic, adds cost for D&H. Although it is difficult to estimate the cost factor that should be ascribed to the retention by the handing-off carrier of liability on haulage traffic that is handled by the hauling railroad, that cost factor undoubtedly is considered by marketing personnel when determining whether the rate and division on a block of haulage traffic justifies pursuing that traffic.

⁸ D&H objected to NYA's discovery request for an explanation of the third party fees and copies of the agreements that establish those fees. On June 28, 2010, NYA filed New York & Atlantic Railway Company's Motion to Compel Responses to the First Set of Discovery Requests Directed to Delaware and Hudson Railway Company, Inc. ("Motion to Compel"). In the Motion to Compel, NYA asked that it be given the opportunity to supplement these comments within seven (7) days after D&H responds fully to NYA's discovery requests.

As the foregoing indicates, at current rate and division levels, D&H's nominal division on the Stone Traffic [

.] It also must be reduced to take into account the cost of the no-fault liability allocation. These adjustments likely will reduce D&H's nominal division on the Stone Traffic to a level that will provide D&H with [] on that traffic.

For the reasons set forth above, NYA questions whether D&H would retain any interest in the Stone Traffic if the Joint Use Agreement were authorized by the Board without conditions. D&H would be left with a move that involves origination costs and a haul of approximately 42.5 to 81.5 miles (depending on the station of origin), for precious little revenue. The Stone Traffic would require marketing effort for a move into a geographic region where D&H has virtually no other traffic. It would also involve handling a low revenue train into a busy yard in Albany. At CPR's published operating ratio of 76 percent⁹, the D&H division on the Stone Traffic, [

⁹ Canadian Pacific press release, dated January 28, 2010 (a copy of which is appended hereto as Exhibit D). The 76 percent operating ratio is for the CPR and its railroad subsidiaries on a consolidated basis.

,] would generate contribution of approximately \$[] per carload.¹⁰

In fact, due to third party fees and liability costs, the contribution of this traffic would be even lower.

[

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B. Cessation of Train Service Over the Albany-Fresh Pond Segment
Will Allow D&H to Exit the New York Market Without Cost

In the Application, Applicants argue that, “[m]oving [D&Hs] . . . traffic in CSXTs regularly scheduled train service will greatly improve D&Hs competitive capabilities in the corridor, by enabling D&H to increase its service offering from twice weekly to five to seven days per week, and eliminating the inefficiencies associated with D&Hs current light density train operations.” Application at 7-8. In theory, an increase in frequency of service should help a carrier to be more competitive in a market. However, the transaction proposed in the Application is not a case of a carrier simply increasing its service. To the contrary, D&H is proposing to *eliminate* its physical

¹⁰ \$[] (D&H’s division if aggregate carloads are less than [] x 0.76 = \$[]).

presence in the Albany to Fresh Pond corridor, which will eliminate 100 percent of its fixed costs of operations¹¹ in that market. Today, if D&H operates at all on the Albany-Fresh Pond Segment, it has pay for crews, locomotives and fuel for its operations, as well as the minimum access fees it pays to CSXT and others. In view of these fixed costs of operating into the New York metropolitan area, D&H should be highly motivated to build its traffic base in order to justify its investment in that service. Despite this, D&H has not marketed aggressively and, with the exception of the Stone Traffic, the traffic has virtually disappeared. Once D&H eliminates its train service to Fresh Pond—and 100 percent of the fixed costs of that service—it will, in fact, have less incentive to market traffic to the New York metropolitan area, not more. Once the train service stops, it can walk away from that market without incurring any on-going losses.

The Applicants do not assert that D&H is losing money on its operations over the Albany to Fresh Pond Segment. Presumably, that is why D&H has not sought Board authority to discontinue its trackage rights over that line.¹² Instead, it appears that D&H views the New York metropolitan area as a marginal market. Its lack of interest in that market over the past decade—as reflected in its disappearing traffic volumes for all

¹¹ The term “fixed costs” in this context refers to the minimum costs of running twice weekly service without regard to traffic volume.

¹² Arguably, a contractual relinquishment of trackage rights for as many as 40 years should be treated as a *de facto* discontinuance of such rights. However, because the Board can address NYA’s concerns under 49 U.S.C. §11323(a) (6), NYA does not urge the Board to require D&H to seek discontinuance authority.

commodities other than stone -- suggests that it prefers to focus its energy and resources in other areas.

In contrast, the D&H traffic, and the Stone Traffic in particular, is very important to NYA. NYA serves Long Island, which does not have an industrial or agricultural base that is rail dependent. For NYA, building materials--inbound stone, lumber, brick, etc.--are important commodities. With a fragile traffic base, NYA can ill afford to lose the D&H traffic, which accounts for approximately [] percent of NYA's revenue and approximately [] percent of its carloads. V.S. Victor at 3.

Similarly, the Stone Traffic is important to the quarries that ship the stone to Long Island and the governmental entities and private parties on Long Island that purchase the stone for construction purposes. If the Stone Traffic ceases to move, purchasers of stone will have fewer sources and likely will pay higher prices.

V. The Conditions Requests by NYA

For the reasons set forth above, NYA urges that the Board condition its approval of the Application on D&H's agreement to keep the existing rate of \$[], and its existing division of \$[], for stone moving from Comstock or Saratoga Springs, NY (and environs) to Long Island, escalated annually by the change in RCAF(u), for a period of five (5) years.

If, as Applicants suggest, D&H will be a more effective competitor in the New York metropolitan market under the Joint Use Agreement, then it should not burden

D&H to agree to a condition that would help ensure that D&H's only significant traffic block to that market will continue to move. The Application states that the Joint Use Agreement will reduce D&H's costs over the Albany-Fresh Pond Segment, and thus the Stone Traffic should be even more profitable to D&H under that arrangement than it is today. Indeed, since D&H has established the overall rate for the Stone Traffic (after obtaining NYA's revenue requirement), D&H should have little objection to keeping that rate in place. In appropriate circumstances, D&H and NYA could always agree to change the rate and/or division in response to changing market conditions.

The condition proposed by NYA is reasonable and appropriate in light of the fact that D&H proposes to cease using its trackage rights over the Albany-Fresh Pond for up to 40 years, pursuant to a contract, without obtaining discontinuance authority from the Board under 49 U.S.C. 10903. [

.] Under these circumstances, the Board should take appropriate steps to prevent D&H from ceasing its trackage rights operations and, under the guise of "joint use," walk away from the New York metropolitan area market simply by not aggressively marketing into that region under the Joint Use Agreement.

VI. Conclusion

As the foregoing indicates, the transaction proposed in the Application, if approved by the Board without the conditions requested in these Comments, will likely

result in the loss by NYA and its shippers of the Stone Traffic. The Stone Traffic is a material portion of NYA's business. In view of the limited traffic opportunities in the market in which NYA competes, it will be difficult to replace this traffic flow.

Moreover, the loss of rail service for stone will adversely affect purchasers of stone on Long Island, both in terms of sources of material and price.

For the reasons set forth in these Comments, NYA believes that the substitution of a haulage arrangement for D&H's physical presence in the New York metropolitan area will make it easier for D&H to withdraw completely from the market. Under the proposed arrangement, D&H would have no investment in operations in the Albany-Fresh Pond segment, and there would be no cost attached to choosing not to exercise its haulage rights. In addition, the compensation terms of the Joint Use Agreement raise questions about whether the Stone Traffic will continue to move under that arrangement.

In light of the importance of the Stone Traffic to NYA, and to the shippers and purchasers of stone on Long Island, it would be appropriate for the Board to impose a condition requiring that the rate and divisions on the Stone Traffic be kept in place, subject to annual escalation based on RCAF(u), for a period of five years. At a minimum, the Board should condition approval on five years of continuing oversight, with regular reporting by D&H, to determine if D&H's cessation of train operations over the Albany-Fresh Pond Segment, and its replacement of that service with haulage

service, has produced any of the benefits—i.e., improved competitiveness as reflected in increased traffic—claimed by the Applicants.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark H. Sidman', is written over a horizontal line.

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(202) 628-2000

Attorney for
New York & Atlantic Railway Company

Dated: July 2, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July 2010 that a true and correct copy of New York & Atlantic Railway Company's Comments in Opposition to Proposed Transaction and Request for Conditions is being served by email and first-class mail, postage prepaid on the following:

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Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

Louis E. Gitomer, Esq.
Law Offices of Louis E. Gitomer, LLC
600 Baltimore Avenue
Suite 301
Baltimore, MD 21204

I hereby certify that on this 2nd day of July 2010 that a true and correct copy of New York & Atlantic Railway Company's Comments in Opposition to Proposed Transaction and Request for Conditions is being served by first-class mail, postage prepaid, on the following:

Attorney General of the United States
c/o Assistant Attorney General
Antitrust Division, Room 3109
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Secretary of Transportation
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Washington, DC 20590

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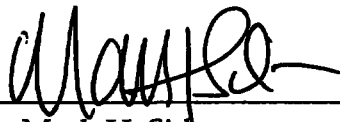
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A handwritten signature in black ink, appearing to read "Mark H. Sidman", written over a horizontal line.

Mark H. Sidman

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35348

**CSX TRANSPORTATION, INC. AND DELAWARE AND HUDSON RAILWAY
COMPANY, INC. – JOINT USE AGREEMENT**

VERIFIED STATEMENT OF PAUL VICTOR

My name is Paul Victor. I am President of New York & Atlantic Railway Company ("NYA" or the "Company"). I have 42 years of experience in the railroad industry, both in the United States and in foreign countries. I have held my current position at NYA since November 2007. As President of NYA, I oversee the operations and administration of the railroad. The Superintendant of Transportation, Director of Marketing and Chief Administrative Officer of NYA report directly to me, and I am involved in all major marketing, transportation and financial initiatives of the Company. My business address is 68-01 Otto Road, Glendale, NY 11385.

NYA operates on the rail lines of The Long Island Rail Road ("LIRR") pursuant to an agreement with LIRR. The Company commenced operations in 1997. It is the only freight railroad that operates in Nassau and Suffolk Counties. The Company interchanges traffic with CSX Transportation, Inc. ("CSXT"), Delaware and Hudson

Railway Company, Inc. ("D&H") and Providence and Worcester Railroad Company at Fresh Pond Junction, and with Norfolk Southern Railway Company and CSXT at Greenville, NJ (via the car float that is operated by New York New Jersey Rail, LLC). The vast majority of NYA's traffic is interchanged with CSXT and D&H, respectively, at Fresh Pond.

The market NYA serves does not have any significant heavy industry, mining, agriculture, chemical producers or other industries that make extensive use of rail transportation. Instead, NYA primarily handles commodities such as building materials (stone, lumber, brick, etc.), waste, food products and scrap metal. The Company makes extensive use of the six transload facilities located on its lines. In the absence of any high volume rail customers, such a power plant, automobile manufacturer or grain company, NYA has to aggressively market to and try to retain relatively low volume shippers.

D&H has access to Fresh Pond via trackage rights over the CSXT line from Albany, NY to Fresh Pond (which line includes segments over Metro North Commuter Rail ("MNCR") and National Rail Passenger Corporation) (the "Albany to Fresh Pond Segment"). D&H conducts twice weekly service. From 2006 through May 2010, our interchange traffic with D&H has been as follows:

Traffic History Between D & H (CPR) and New York & Atlantic for Period 2006 and 2010

<i>Year</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>
Non Stone Traffic	[]	[]	[]	[]	[]
Stone Traffic	[]	[]	[]	[]	[]
<i>Total Traffic</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>	<i>[]</i>

As the foregoing shows, there has been a dramatic shift in the D&H traffic from 2006 to the present. In 2006, the D&H traffic consisted of [] carloads, of which [] carloads ([] percent) were stone ("Stone Traffic") and [] ([] percent) were other commodities ("Other Traffic"). In contrast, by 2009, the D&H Traffic consisted of [] carloads, of which [] were Stone Traffic ([] percent) and only [] carloads ([] percent) were Other Traffic. The Stone Traffic accounted for [] percent of NYA's total carload volume in 2008, and [] percent of NYA's carload volume in 2009. That traffic flow produced [] percent and [] percent of NYA's freight revenue in 2008 and 2009, respectively.

The steady decline of Other Traffic - - [] carloads in 2006; [] carloads in 2007; [] carloads in 2008; [] carloads in 2009; and just [] carloads in the first five months of 2010 – reflects a general lack of interest on the part of D&H in the NY metropolitan area market.

The Stone Traffic typically moves in 30-car unit trains. The traffic is seasonal, but for much of the year D&H and NYA interchange two unit trains of stone per week. The traffic originates in Saratoga Springs, NY and Comstock, NY. NYA currently delivers the stone to a customer in Holtsville, NY.

The Stone Traffic is a lowly rated commodity, which moves under a rate of \$[] per carload. NYA's division of revenue is \$[], and D&H's division of revenue is \$[]. NYA's and D&H's respective divisions of revenue on the Stone Traffic are [].

However, there are efficiencies associated with unit train service that make the Stone Traffic worthwhile. Also, for D&H, the Stone Traffic involves a relatively short haul when compared to the Other Traffic, most of which originates in Canada.

In my judgment, [

.]

If D&H ceased using its trackage rights over the Albany to Fresh Pond Segment, and instead moved the Stone Traffic over the Albany to Fresh Pond Segment under the Joint Use Agreement proposed by CSXT and D&H, D&H would still have to be involved in the handling of that traffic. D&H would be the originating carrier from

both the Comstock and Saratoga Springs origins. It would handle the traffic from those origins to Albany, a distance of approximately 81.5 miles in the case of Comstock and approximately 42.5 miles in the case of Saratoga Springs. It would then have to pay a fee to CSXT for the handling of the Stone Traffic from Albany to Fresh Pond. In 2009, most of the Stone Traffic – [] out of [] carloads – originated at Comstock.

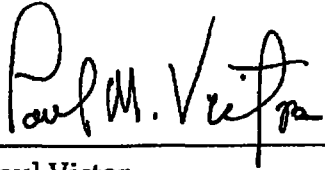
D&H's division of revenue in the Stone Traffic - - \$[] – [

.] As the traffic

data for 2006 through 2010 set forth above shows, the revenue on Other Traffic apparently has not been sufficient to keep D&H interested in the New York metropolitan area market. I am concerned that, if D&H must pay any significant haulage fee to CSXT, it may lose interest in the Stone Traffic as well.

VERIFICATION

I, Paul Victor, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this verified statement.



Paul Victor

Dated: July 2, 2010

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35348

**CSX TRANSPORTATION, INC. & DELAWARE AND HUDSON
RAILWAY COMPANY, INC. - JOINT USE AGREEMENT**

**APPLICANT DELAWARE AND HUDSON RAILWAY COMPANY, INC.'S
RESPONSES AND OBJECTIONS TO NEW YORK & ATLANTIC
RAILWAY COMPANY'S FIRST SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION**

Pursuant to 49 C.F.R. Part 1114 and other applicable rules and authority, Applicant Delaware and Hudson Railway Company, Inc. ("D&H"), through the undersigned counsel, responds as follows to New York & Atlantic Railway Company's ("NYA's") First Set of Interrogatories and Requests for Production to D&H.

GENERAL OBJECTIONS

D&H's General Objections, as set forth herein, are to be considered objections to each of the specific Interrogatories and Requests that follow. D&H's objections shall not waive or prejudice any objections that it may later assert.

1. D&H objects to any and all definitions and/or instructions to the extent that those definitions and instructions either expand upon or conflict with 49 C.F.R. Part 1114, Subpart B. Further, D&H objects to these Interrogatories and Requests to the extent that they seek to impose obligations on D&H greater than, or inconsistent with, those imposed under 49 C.F.R. Part 1114, Subpart B.

2. D&H objects to each and every Interrogatory and Request to the extent that it seeks information protected by the attorney-client privilege, the attorney work-product doctrine,

or any other applicable privilege, exemption or protection from discovery or disclosure. In the event that any information that is the proper subject of the attorney-client privilege, the attorney work-product doctrine and/or other applicable privilege, exemption or protection is inadvertently produced or provided, such disclosure is not to be construed as a waiver of such privilege, exemption or protection. D&H reserves the right to demand that such inadvertently produced privileged information be returned to it and that all copies in NYA's possession, and that of its counsel, consultants, subsidiaries or other agents, be destroyed.

3. D&H objects to each and every Interrogatory and Request to the extent that it seeks production of information or data that is not relevant to the subject matter at issue in this proceeding and/or not reasonably calculated to lead to the discovery of admissible evidence.

4. D&H objects to each and every Interrogatory and Request to the extent that it would require D&H to perform a special study to derive the requested information.

5. D&H objects to each and every Interrogatory and Request to the extent that it: (a) is overly broad; (b) is vague or ambiguous, or fails to describe with reasonable particularity the information sought; or (c) imposes undue burdens on D&H that outweigh any probative value the information sought may have in this proceeding.

6. D&H objects to each and every Interrogatory and Request to the extent that it purports to request information that is already in the possession of NYA, or that is otherwise publicly available or accessible to NYA.

7. D&H objects to NYA's Definition No. 9 defining "Document" to the extent it seeks to impose obligations broader than, or inconsistent with, those imposed by 49 C.F.R. Part 1114. D&H further objects to the definition of "Document" to the extent it seeks "records or reports of negotiations," a subject that is not relevant to any conceivable issue in this

proceeding. D&H further objects to the definition of “Document” to the extent that it is intended to seek production of drafts, incomplete or in-process versions of any agreement, communication, or other document, as seeking information that is not relevant to this proceeding and is not reasonably calculated to lead to the production of admissible evidence. In these Responses, D&H will interpret the term “Document” to exclude any data or information that is protected from discovery or disclosure by privilege, protection, doctrine, or rule.

8. D&H objects to NYA’s Definition No. 10 defining “Haulage Rights,” on the grounds that the Joint Use Agreement referenced in the definition is not a “haulage” agreement and does not contain any “haulage” provisions.

9. D&H objects to NYA’s Definition No. 11 defining “‘Identify’ when used in relation to a document” to the extent it seeks to impose obligations or requirements beyond, in addition to, or inconsistent with discovery obligations under 49 C.F.R. Part 1114. D&H has no duty to search for, gather and catalog every document possibly implicated by an Interrogatory with the multiple pieces of information specified as required by the definition. This definition would impose an undue burden that outweighs any relevance or probative value the information sought may have in this proceeding. D&H will respond to any Interrogatory asking it to “identify” particular documents as if it were a request for production of those documents and respond in accordance with 49 C.F.R. Part 1114.30.

10. D&H objects to Instruction No. 4 to the extent it attempts to impose obligations or requirements beyond, in addition to, or inconsistent with D&H’s discovery obligations under 49 C.F.R. Part 1114. D&H’s duties in responding to NYA’s discovery requests are governed by the Board’s rules, and NYA cannot change or add to those duties by positing additional “Instructions.”

11. Information set forth in these Responses that has been designated Confidential by D&H is identified by single brackets { }.

12. In responding to NYA's Interrogatories and Requests for Production of Documents, D&H does not concede the relevance, materiality, competency, or admissibility as evidence of the information sought therein.. D&H reserves its right to object on any grounds to the use of the responses herein in this proceeding or in any subsequent appeal, proceeding, action, or trial.

SPECIFIC OBJECTIONS AND RESPONSES

In addition to its General Objections (which shall apply in full to each and every Interrogatory and Request, without further enumeration), D&H also asserts the following Specific Objections to NYA's Interrogatories and Requests. D&H preserves all of its General Objections set forth above, and none of the following Specific Objections shall waive or limit the scope, breadth, generality, or applicability of those General Objections.

INTERROGATORIES

INTERROGATORY NO. 1.

For each of the years 2007, 2008 and 2009, identify:

- (a) The number of carloads of traffic, by commodity, handled by D&H over all or any portion of the Trackage Rights Route;
- (b) The number of carloads of traffic, by commodity, handled by D&H over all or a portion of the Trackage Rights Route and interchanged to (i) NYA, and (ii) railroads other than NYA; and
- (c) The number of carloads of traffic, by commodity, handled by D&H over all or any portion of the Trackage Rights Route directly to or from a Shipper (via the

Oak Point Switching Agreement, reciprocal switch or otherwise) in the New York Metro Area.

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to subpart (b) on the grounds that information regarding the number of carloads interchanged between D&H and NYA is (or should be) already in NYA's possession. Subject to and without waiving these objections or the General Objections, D&H responds as follows:

The number of carloads handled by D&H over all or a portion of the Trackage Rights Route during the years 2007-2009, and (i) interchanged with NYA; (ii) interchanged with a railroad other than NYA; or (iii) handled by D&H directly to or from a shipper, is set forth in Table 1:

Table 1: D&H Traffic – Albany/Selkirk to NYC

Commodity Group	2007			2008			2009		
	CSXT	NYA	Totals	CSXT	NYA	Totals	CSXT	NYA	Totals
Chemical & Energy									
Consumer Products									
Forest Products									
Grain									
Mines and Minerals									
Total Carloads									

CSXT = Carloads to/from shippers
via Oak Point

NYA = Carloads interchanged with NYA at
Fresh Pond

D&H does not interchange traffic moving over Trackage Rights Route with carriers
other than NYA

Additional details regarding the traffic handled by D&H over the Trackage Rights Route during 2007 – 2009 are set forth in documents being produced in response to NYA Request for Production No. 1.

INTERROGATORY NO. 2.

For each of the years 2007, 2008 and 2009, identify:

- (a) For D&H and its affiliates in the United States, (i) the system average revenue per carload for stone and aggregate traffic moving under STCC 14, and (ii) the system average revenue per car-mile for stone and aggregate traffic moving under STCC 14.
- (b) For D&H and its affiliates in the United States, the average revenue per carload and average revenue per-car mile for stone, and aggregate traffic moving under STCC that was interchanged by D&H to NYA.

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Interrogatory to the extent that it seeks information regarding “affiliates of D&H in the United States,” on the grounds that information regarding traffic handled by such affiliates (and not by D&H) is not in D&H’s possession. D&H also objects to this Interrogatory on the grounds that it would require D&H to perform a special study to determine the “system average revenue per-car” and “system average revenue per-car mile” for D&H’s stone and aggregate traffic generally, and for stone and aggregate traffic that D&H interchanged with NYA. D&H does not compile or maintain that information in the normal course of business. Answering this Interrogatory or producing business records from

which the answer could be derived would impose an undue burden on D&H that far outweighs any relevance or probative value the information sought may have in this proceeding.

INTERROGATORY NO. 3.

Identify and provide the amount of all fees and charges currently paid by D&H to third parties in connection with handling D&H trains over the Trackage Rights Route for interchange with NYA at Fresh Pond Junction including (i) trackage rights fees paid to CSXT, and (ii) trackage rights fees or other charges paid to National Railroad Passenger Corporation, Metro North Commuter Railroad, or the New York State Department of Transportation.

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Interrogatory on the grounds that it would require D&H to perform a special study to determine the amount of fees and charges paid by D&H to third parties in connection with the movement of D&H trains over the Trackage Rights Route during the years 2006, 2008 and 2009. Subject to and without waiving these objections or its General Objections, D&H states that the fees and charges paid by D&H to third parties in connection with the movement of D&H trains over the Trackage Rights Route during 2007 (which data D&H compiled in connection with its consideration of the proposed joint use agreement) are set forth in documents being produced in response to NYA Request for Production No. 3.

INTERROGATORY NO. 4.

For each of the years 2002, 2003 and 2004, identify the number of carloads of traffic, by commodity, handled by D&H via trackage rights over all or any portion of the Southern Tier Line.

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Interrogatory on the grounds that it would require D&H to perform a special study to determine the number of carloads of traffic, by commodity, handled by D&H via its trackage rights over the Southern Tier Line during the subject years. D&H also objects to this Interrogatory on the grounds that it would be unduly burdensome for D&H to search for traffic data dating back eight years (to 2002) and relating to rail lines over which D&H no longer conducts train operations (such data may not, in any event, be available). Answering this Interrogatory or producing business records (if available) from which the answer could be derived would impose an undue burden on D&H that far outweighs any relevance or probative value the information sought may have in this proceeding.

INTERROGATORY NO. 5.

For each of the years 2006 through 2009 inclusive, identify the number of carloads of D&H traffic, by commodity, handled by NS for D&H over all or any portion of the Southern Tier Line, pursuant to the haulage arrangement between NS and D&H described in the STB's decision in Docket No. AB-156 (Sub-No. 25X), et al. (served January 19, 2005).

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Interrogatory on the grounds that it would require D&H to perform a special study to determine the number of carloads of traffic, by commodity, that moved via D&H's haulage arrangement with NS over the Southern Tier Line during the subject years. Answering this Interrogatory or producing business records from which

the answer could be derived would impose an undue burden on D&H that far outweighs any relevance or probative value the information sought may have in this proceeding.

INTERROGATORY NO. 6.

Describe (i) the methodology used by D&H to establish the haulage fee payable by D&H to CSXT pursuant to Section 9 of the Joint Use Agreement, for traffic moving over the Trackage Rights Route, and (ii) any analysis performed by D&H to compare the haulage fee payable by D&H to CSXT pursuant to Section 9 of the Joint Use Agreement for traffic moving over the Trackage Rights Route, to the trackage rights fee and other fees payable by D&H under the Trackage Rights Agreement for D&H train operations over the Trackage Rights Route.

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Interrogatory on the grounds that the term “haulage fee” is vague (insofar as Section 9 of the Joint Use Agreement does not make reference to any “haulage fee” payable by D&H to CSXT). D&H will interpret the term “haulage fee” as referring to the “D&H Service Fee” referenced in Section 9.03 of the Joint Use Agreement. Subject to and without waiving these objections or its General Objections, D&H responds as follows:

(i) The “methodology” used by D&H to establish the D&H Service Fee was negotiation with CSXT.

(ii) D&H’s analysis comparing the D&H Service Fee payable by D&H pursuant to Section 9 of the Joint Use Agreement with the fees and expenses incurred by D&H in connection with its existing trackage rights operations over the Trackage Rights Route (based upon 2007 traffic), which D&H prepared in connection with its consideration of the proposed joint use

agreement, is set forth in the documents being produced in response to NYA Request for Production No. 1.

INTERROGATORY NO. 7.

Identify all haulage arrangements currently in effect between D&H and another railroad, and the fee paid/received by D&H (on a per car or similar basis) under each such arrangement.

RESPONSE:

D&H objects to this Interrogatory on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Interrogatory on the grounds that the information it seeks is highly proprietary and commercially sensitive, and the disclosure of which could generate anticompetitive effects and commercial harm to D&H and to other parties to those agreements that far outweigh any conceivable relevance or probative value the information sought may have in this proceeding. D&H also objects to this Interrogatory on the grounds that several of the haulage agreements to which D&H is a party contain confidentiality provisions that expressly prohibit disclosure of those agreements (or their terms) to third parties without the prior written consent of the other party to such agreements.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1.

Produce all documents identified in, related to, consulted, reviewed, or relied upon in making, or otherwise supporting, any of D&H's responses to the Interrogatories set forth above.

RESPONSE:

D&H objects to this Request on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Request to the extent that it calls for the

disclosure of documents protected by the attorney-client privilege and/or the work product doctrine. D&H also objects to this Request as overbroad and unduly burdensome to the extent it seeks production of “all documents . . . related to” or “otherwise supporting” D&H’s responses to NYA’s Interrogatories. Subject to and without waiving these specific objections or its General Objections, D&H will produce those non-privileged, responsive documents that are identified in, or were consulted, reviewed or relied upon by D&H in preparing, its responses to NYA’s Interrogatories.

REQUEST FOR PRODUCTION NO. 2.

Produce all traffic studies, marketing studies or analyses, financial projections and reports (including workpapers) prepared by or for D&H employees and/or its Consultants in connection with the proposed Transaction and related to (i) traffic handled by D&H to the New York Metro Area, or (ii) potential traffic for D&H to handle to the New York Metro Area.

RESPONSE:

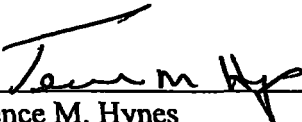
D&H objects to this Request on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Request as overbroad and unduly burdensome. Subject to and without waiving these specific objections or its General Objections, D&H will produce non-privileged, responsive documents.

REQUEST FOR PRODUCTION NO. 3.

Produce all cost studies, cost analyses, financial projection or reports prepared by or for D&H employees and/or its consultants related to (i) the cost to D&H of providing service to the NY Metro Area via the Trackage Rights, and/or (ii) the cost to D&H of providing service to the NY Metro Area via the Haulage Rights.

RESPONSE:

D&H objects to this Request on the grounds that the information it seeks is neither relevant to any issue in this proceeding nor reasonably calculated to lead to the production of admissible evidence. D&H further objects to this Request on the grounds that the term "Haulage Rights" is vague, insofar as the Joint Use Agreement does grant any "Haulage Rights" to D&H. D&H will interpret the term "Haulage Rights" as referring to the joint use rights granted to D&H by the Joint Use Agreement. Subject to and without waiving these specific objections or its General Objections, D&H will produce the analysis comparing the D&H Service Fees payable by D&H pursuant to Section 9 of the Joint Use Agreement with the fees and expenses incurred by D&H in connection with its existing trackage rights operations over the Trackage Rights Route (based upon 2007 traffic), which D&H prepared in connection with its consideration of the proposed joint use agreement.


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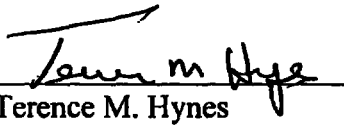
*Attorneys for Delaware and Hudson
Railway Company, Inc.*

Dated: June 25, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Responses and Objections to the New York & Atlantic Railway Company's First Set of Interrogatories and Requests for Production to Delaware and Hudson Railway Company, Inc. to be served by hand-delivery this 25th day of June 2010 on:

Mark H. Sidman
Weiner Brodsky Sidman Kider PC
1300 Nineteenth Street, N.W., Fifth Floor
Washington, D.C. 20036


Terence M. Hynes

Analysis of 2007 Revenue & Cost - East of the Hudson
Preliminary

[INTENTIONALLY OMITTED]



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Canadian Pacific announces 2009 results

January 28, 2010
Calgary, Alberta

Canadian Pacific Railway Limited (TSX/NYSE: CP) announced its fourth-quarter and full-year 2009 results today. Net income in the fourth-quarter was \$194 million, an increase of three per cent from \$188 million in fourth-quarter 2008 and diluted earnings per share were \$1.15, down from \$1.21 in fourth-quarter 2008. Foreign exchange gain and loss on long-term debt and other specified items, including a charge on the termination of a shortline railway lease, and two favourable income tax items had a net positive impact on earnings per share of \$0.21. Excluding these items, adjusted diluted earnings per share were \$0.94 down 12 per cent from \$1.07 in fourth-quarter 2008.

"We have come through an extraordinary year of economic challenges and we met these with focused productivity initiatives that have delivered sustainable improvements," said Fred Green, President and CEO. "Markets remain uncertain and we will continue to drive efficiency while delivering a reliable service. We are positioned with assets and resources to respond to changes in our customers' demand."

■ Q4 2009 Earnings Release and Financial Reports

For the fourth-quarter and full year 2009, the results of the Dakota, Minnesota & Eastern Railroad (DM&E) are fully consolidated with CP's results. For the first ten months of 2008, however, DM&E earnings were reported as equity income on one line of the income statement. In order to aid in the evaluation of the underlying earnings trends, 2008 results have also been presented on a pro forma basis, by redistributing DM&E's operating results from an equity income basis of accounting to a line-by-line consolidation of DM&E revenues and expenses. This pro forma financial data presentation is a non-GAAP measure.

FOURTH-QUARTER 2009 COMPARED WITH FOURTH-QUARTER 2008 EXCLUDING FOREIGN EXCHANGE GAIN AND LOSS ON LONG-TERM DEBT AND OTHER SPECIFIED ITEMS ON A PRO FORMA BASIS:

- Total revenues were \$1.1 billion, down 16 per cent from \$1.3 billion
- Operating expenses were \$853 million, down 17 per cent from \$1.0 billion
- Operating income decreased to \$269 million from \$304 million, or 12 per cent
- Operating ratio improved 120 basis points to 76.0 per cent
- Diluted earnings per share decreased to \$0.94 from \$1.07, or 12 per cent

For the full year, 2009 net income increased slightly to \$612 million from \$607 million in 2008 and diluted earnings per share were \$3.67, down six per cent from \$3.91.

FULL YEAR 2009 COMPARED WITH FULL YEAR 2008 EXCLUDING FOREIGN EXCHANGE GAIN AND LOSS ON LONG-TERM DEBT AND OTHER SPECIFIED ITEMS ON A PRO FORMA BASIS:

- Total revenues were \$4.3 billion down 18 per cent from \$5.2 billion
- Operating expenses were \$3.4 billion a decrease of 17 per cent from \$4.1 billion
- Operating income was \$900 million a decrease of 20 per cent from \$1.1 billion
- Operating ratio increased 70 basis points to 79.1 per cent from 78.4 per cent
- Diluted earnings per share were \$2.76 down from \$3.99, or 31 per cent

2010 ASSUMPTIONS

CP plans to spend in the range of \$680 million to \$730 million on capital programs in 2010. These planned capital investments include approximately \$585 million for the renewal of track infrastructure.

In December of 2009, CP made a voluntary prepayment of approximately \$500 million